Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

Nos. 78-1180, 78-1193

BENJAMIN JULIAN ROSENTHAL,
Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,
Respondent.

DONALD S. CARNOW,
Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,
Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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OCTOBER TERM, 1978.

No. 78-1180, 1193.

BENJAMIN JULIAN ROSENTHAL,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

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vs.

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BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

STATEMENT OF THE CASE.

Petitions number 78-1180 and 78-1193 arise from the judgment of the Supreme Court of Illinois in the case of *In re Donald S. Carnow and Benjamin Julian Rosenthal, Attorneys,* case No. 50098, entered October 6, 1978, 352 N. E. 2d 257. Since

the instant *petitions* arise from the same case and the questions raised are similiar, Respondent submits the following in opposito both *petitions*.

STATEMENT OF FACTS.

Petitioners testified under grants of immunity in the federal criminal trial of Stanley Zima which trial resulted in the conviction of Zima for the crime of extortion. As revealed in the *petitions*, petitioners testified in the criminal trial that Zima sought and received $20,000 in order that he not block a rezoning application filed by petitioners' client. The nature and extent of petitioners' involvement in the extortion scheme was the issue in the disciplinary proceeding below.

Petitioners characterize themselves as extortion victims as was their client and the factual statements contained in the *petitions* reflect their attempt to minimize their involvement. Respondent refers this Court to the opinion of the Court below (attached as Appendix C to each *petition*) which carefully sets out the facts and reveals that petitioners knowingly participated in and facilitated the extortion scheme.

STAGE IN THE PROCEEDINGS BELOW AT WHICH FEDERAL QUESTIONS WERE RAISED.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1257(c). The opinion of the Court below is silent as to any federal questions which may have been raised by petitioners. Nevertheless, each petitioner asserts that appropriate federal questions were raised, ". . . at every stage of the proceedings, from the first instant at which the question of penalty was considered." (*Carnow petition*, p. 10, *Rosenthal petition*, p. 17). The record is contrary.

Illinois Supreme Court Rules create a disciplinary process consisting of an Inquiry Board, Hearing Board and Review Board. *Ill. Rev. Stat.*, 1977, Ch. 110A § 751-770. The Hearing

Board is comparable to a trial court and the Review Board, an appelate court of initial review.[1]

Illinois Supreme Court Rules provide in cases where discipline is recommended by either board, the attorney involved may file exceptions to the report of the Hearing Board with the Review Board or to the report of the Review Board with the Supreme Court of Illinois. *Ill. Rev. Stat.*, 1977, Ch. 110A § 753(e).

Each petitioner filed exceptions to the report and recommendation of the Hearing Board. Although the Hearing Board had recommended that petitioners be disbarred, no federal questions were raised by either petitioner in his exceptions.

Each petitioner also filed exceptions in the Supreme Court to the report of the Review Board. Again petitioner Rosenthal raised no federal question whatsoever. Petitioner Carnow stated:

> . . . the Administrator neither *pleaded* nor proved by clear and convincing evidence that Respondent's conduct was the product of fraudulent, dishonest or corrupt intent or motives. Respondent respectfully submits the failure to plead is violative of Respondent's 14th Amendment substantive due process rights and is fatal error In re: Smith, 356 Ill. 11, 5 N.E.2d 227. (*Carnow Exceptions to Report of Review Board*, Appendix D, p. A26).

Further, apparently referring to the mandate of the Supreme Court of Illinois that the Administrator of the Attorney Registration and Disciplinary Commission investigate conduct of attorneys which tends to defeat the administration of justice or bring the courts or the legal profession into disrepute (*Ill. Rev. Stat.*, 1977, Ch. 110A § 752), petitioner Carnow said:

> This standard has been unconstitutionally applied to the Respondent, and thus violative of Respondent's 14th Amendment Right to substantive due process of law in that the complaint failed to plead "intent" to perform a fraudulent, dishonest or corrupt practice as an essential element

1. Both the Hearing Board and the Review Board recommended that petitioners be disbarred.

thereof. See *In re: Ruffalo*, 390 U.S. 544. Substantive due process is required as matter of law in attorney disciplinary proceedings. (*Carnow Exceptions to Report of Review Board*, Appendix D, p. A28).

The opinion of the Court below is primarily a factual recitation of the extent of petitioners' involvement in the extortion scheme. The Court's opinion does not reflect that any of petitioner Carnow's purported federal questions were further briefed or argued.

Each petitioner filed a petition for rehearing of the decision of the Supreme Court of Illinois. Petitioner Rosenthal for the first time suggested that disbarment in his case would violate the Sixth, Eighth and Fourteenth Amendments. (*Rosenthal petition for rehearing*, Appendix E, pp. A30, A33). Petitioner Carnow argued that disbarment violates his Sixth Amendment right to know the charge against him, amounts to denial of equal protection of the laws, and constitutes cruel and unusual punishment. (*Carnow petition for rehearing*, Appendix F, p. A39).

The Illinois Court denied the petitions for rehearing without specifically addressing the questions raised.

REASONS FOR DENYING THE WRIT.

I. Petitioner Rosenthal Has Failed to Raise Timely Any Federal Questions.

Petitioner Rosenthal argues that the decision of the Court below disbarring him constitutes a denial of "due process and equal protection of the laws in violation of the United States Constitution" (*petition*, p. 22), "cruel and unusual punishment in violation of Amendment 8 of the United States Constitution" (*petition*, p. 36) and contravenes the immunity order of March, 1973 which is valid and binding pursuant to the *All Writs Act*, 28 U. S. C. § 1651, the Court's inherent common law power

and the supremacy clause of Article VI of the United States Constitution (*petition*, p. 30).[2]

It has long been held that the Supreme Court is vested with no jurisdiction unless a federal question was raised and decided in the state court below. *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969); *Tacon* v. *Arizona*, 410 U. S. 351 (1972). Further, raising a federal question for the first time in a petition for rehearing addressed to the highest state court is insufficient unless the Court entertains the petition and expressly decides the question. *Radio Station WOW* v. *Johnson*, 326 U. S. 120 (1945).

Petitioner Rosenthal asks this Court to review questions not raised in the proceeding below. Consideration of the Rosenthal petition and the record before the Court reveals that petitioner is really asking this Court to review the merits of the case against him. He has presented no justiciable federal question.

II. Petitioner Carnow Has Raised No Substantial Federal Question.

The Carnow petition constitutes a blatant attempt to mislead this Court as to the nature and extent of petitioner's involvement in the payoff scheme. Petitioner attempts to further mislead this Court by suggesting that the Court below is corrupt and that its disbarment of him was politically motivated revenge for having testified against a local official. Though unsupported by anything in the record, petitioner's contention is consistent with his self-righteous pose throughout the proceeding below. As proved by the evidence, petitioner is a bagman lawyer. His willingness to sacrifice professional obligations to the economic interests of himself and his client is reflected in his attempt to mislead this Court.

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2. Petitioner had asserted immunity as an affirmative defense before the Hearing Panel. The Panel overruled that defense (*Report of the Hearing Panel*, Conclusions, par. 6; see Appendix to Petition, p. 5a). Petitioner took no exception to that ruling until now.

Petitioner Carnow was charged in the proceeding below with, among other things, having, "counselled and knowingly assisted and participated in conduct which resulted in the furtherance of a crime (*Complaint*, par. 13(b); see *Petition*, p. 22a). Throughout the proceeding below and in this Court, petitioner Carnow has maintained that he was a victim of extortion, coerced to such an extent that his acts were unwitting; hence he lacked sufficient "intent" to be held professionally responsible for his acts while so "coerced". The Court below rejected petitioners argument as not supported by the evidence.

The "federal questions" raised by petitioner in the proceeding below and in this Court are an attempt by petitioner to transform his unproved factual defense into a legal issue of constitutional significance.

Although cast in constitutional terms petitioner Carnow is asking that this Court review the weight and sufficiency of his factual defense. This Court has long held that certiorari will not be granted to review a lower court's analysis of particular facts involved. *United States* v. *Johnston*, 268 U. S. 220 (1924).

III. The Decision of the Court Below Is Based Upon an Adequate and Independent State Ground.

The Court has long recognized that the individual state's interest in maintaining and regulating its judicial system is a compelling one. *Collector* v. *Day*, 78 U. S. 113 (1870); *Konigsberg* v. *State Bar of California*, 358 U. S. 252 (1957); *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975). Certainly this Court may intervene where valid constitutional questions are raised. *Spevack* v. *Klein*, 385 U. S. 411 (1967); *In re Ruffalo*, 390 U. S. 544 (1968).

The record below reveals that petitioners were afforded notice of the charge and an opportunity to defend. *In re Ruffalo, supra.* Indeed a lengthy hearing was held and petitioners called witnesses. The disbarment of petitioners constitutes the exercise

of the Illinois Court's inherent power to discipline attorneys admitted to practice before it. *In re Sherman*, 60 Ill. 2d 590, 328 N. E. 2d 553 (1975).

CONCLUSION.

For the reason stated above, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

BEFORE THE REVIEW BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

In the Matter of: BENJAMIN JULIAN ROSENTHAL, *Respondent.*	No. 76 CH 36 76 CH 37 Consolidated

EXCEPTIONS TO THE REPORT OF THE HEARING PANEL

Now comes Respondent Benjamin Julian Rosenthal, by his attorney Barry J. Freeman, and files his Exceptions to the Report of the Hearing Panel as follows:

I.

Exceptions to Finding of Fact

A. In the Panel's *Finding of Fact* there are omitted a substantial number of proven facts which are material to the ultimate decision to be made by the Board. The omitted material facts which should be included in the Hearing Panel's Report are as follows:

(1) Paragraph 3 alludes to denial of the zoning variance "because of political implications brought forward by the Ward Committeeman". This reference is "politically" vague. In reality, the denial was perpetrated (as Stanley Zima predicted) for the purpose of laying a foundation for the extortion that followed.

(2) Paragraph 4 should be expanded to include the fact that on June 18, 1969, two days prior to the hearing, Zima, then Secretary to the Committee of Building and Zoning, stated that he could help get the zoning approved but that it would require the payment of attorneys' fees or political contributions in the sum of $20,000 to $30,000 and that, if said sums of money were made available, Pecord's zoning change would not be blocked by the local Ward Committeemen.

(3) Paragraph 4 should further reflect that Respondent specifically repudiated Zima's suggestion and told him "I think on the merits I'm going to get it on the presentation. At least we are going to try, and if we do get rejected, Mr. Carnow and I have discussed this, and we believe that once there is a rejection and we have exhausted our Administrative Remedy, we can go in for a Declaratory Judgment and get fast action. . . ". (Tr. pp. 86-90, 159-162).

(4) Paragraph 4 should further note that Respondent did not relate the June 18, 1969 conversation with Zima to his client and Respondent proceeded to prepare for the June 20 presentation before the Committee. (Tr. pp. 162, 163).

(5) On June 20, 1969 objections to Pecord's petition were made by the local Ward Committeemen and the Committee made no recommendation, which in fact defeated the petition and denied Respondent the ability to appeal.

(6) On June 23, 1969 a Special Use Ordinance was passed by the City Council, the nature of which would permit the use of the property in question as a nursing home under a strict construction of the City of Chicago Ordinances. Respondent endeavored to seek an extension of time on Mr. Pecord's contract with the FSLIC for the purchase of the subject property, so that he could proceed under the new ordinance. The FSLIC, however, refused

any further extensions of time unless the zoning change was acquired.

(7) Paragraph 6 of the Panel's findings should be expanded to include the fact that shortly after the hearing of June 20 Zima made a series of threatening telephone calls to Donald Carnow, wherein he stated that unless Pecord paid the required fee Zima would see to it that Pecord would never obtain the zoning and that the nursing home would never be opened and that Pecord would be forced into bankruptcy. (Tr. pp. 46-51, 180, 371-372).

(8) Mr. Pecord communicated to Respondent in late July of 1969 that he would pay the $20,000 as demanded by Zima. Respondent at that time advised Mr. Pecord that he would withdraw as counsel. (Tr. pp. 132-135).

(9) The Panel's paragraph 6 should be further expanded to reflect that on August 15, 1969 a meeting occurred between Zima, Carnow and Rosenthal, wherein Carnow and Rosenthal informed Zima that they were withdrawing from representation of Pecord. At that time Zima persisted in his threats against Pecord and further stated that Respondent and Carnow had to remain in the matter; that if they went to the federal authorities neither Carnow nor Respondent would ever practice law again in the City of Chicago.

(10) The Panel's paragraph 6 should be further expanded to reflect that Respondent under threat of Zima and fear for the safety of his client, his associate, their families, as well as himself and his family, complied with Zima's demands.

(11) The Panel should have further found that Respondent was a victim of Zima's extortion and that he was also duty-bound to comply with his client's desires, where his client stood exposed to injury if he did not comply with the extortion.

(12) The Panel should have found in addition that Respondent reasonably perceived that complaints to the prosecuting authorities about Mr. Zima's activities and the activities of the City Council would fall on deaf ears and might ultimately result in the type of retribution to himself and his client which was threatened by Zima.

(13) Finally, the Panel should have found that during Respondent's entire 24 years of the practice of law he always conducted himself in a manner consistent with the highest traditions of the bar. Respondent's reputation in the business and legal community has been excellent and he has willingly engaged in matters of community interest, sometimes on a *pro bono* basis. (Tr. pp. 112, 211, 334-338, 340-342, 351, 354-357, 266, 317).

B. Paragraph 5 of the Panel's Finding of Fact holds it to be immaterial that Respondents counseled their client against paying the money to Zima since Respondents eventually played an active role in paying it. This is not a finding of fact but is instead an erroneous conclusion of fact and law. Respondent emphatically objects to this ruling in that the Panel here totally ignores the fact that Respondents did counsel Pecord against paying the money to Zima until Respondents themselves became the *victims* of Zima's extortion, at which time by definition their "active role in paying it" was involuntary and under physical and economic threat. Paragraph 5 is thus totally inconsistent with the Panel's paragraph 6 which affirms Respondents' position that they themselves were victims of Zima's extortion.

II.

Exceptions to the Panel's Conclusions of Fact and Law.

A. The Panel's Conclusions of Fact and Law are inconsistent with the facts in the record.

(1) Respondents' failure to come forward and notify the proper authorities was the result of Zima's threats and

the reasonable fear that those authorities would fail to act or protect Respondents under the prevailing political atmosphere at the time.

(2) Cannon 4, DR4-101(c), prohibited the disclosure of client confidences since such disclosure could reasonably have subjected the client to economic disaster, a power which was well within Zima's sphere of influence.

(2) Although it is true that Respondent knowingly engaged in conduct prejudicial to the administration of justice, such conduct was the result of Zima's extortive demands and under those circumstances could not adversely reflect on Respondent's fitness to practice law. The facts reflect that Respondents were not willing participants in Zima's crime and that they acted as victims of that crime.

(3) There is no evidence that Respondents or their client possessed the requisite intent to do anything improper absent Zima's threats which compelled them to act against their will.

B. The Panel's conclusions failed to recognize the ruling of the Illinois Supreme Court which require clear and convincing evidence of evil motive and intent before disbarment is appropriate. *In Re Lasecki*, 358 Ill. 69; *In Re Haliman*, 384 Ill. 325; and *In Re Donhghy*, 402 Ill. 120. The Administrator has failed to establish such motive or intent.

III.

Exception to the Recommendation of the Panel.

The recommendation of the Panel of disbarment is entirely unwarranted in light of the facts proven in the record; it is further cruel and harsh in light of *In Re Leonard*, 64 Ill. 2d 398, and *In Re Bourgeois*, 25 Ill. 2d 47.

The only question for consideration by the Panel should have been whether or not the record proves that Respondent willingly

aided in the commission of a crime, or if he himself was a victim of that crime. The record is conclusive of the latter. As victims, in fear of their own physical and economical well-being as well as the well-being of their client, their actions should not have warranted discipline of any kind, let alone the harshest discipline of disbarment. The conclusion of this Panel is tantamount to the prosecution of a rape victim for adultery, and its recommendation should be reconsidered.

Respectfully submitted,

/s/ BARRY J. FREEMAN
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APPENDIX B

BEFORE THE REVIEW BOARD OF THE ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION

In the Matter of: DONALD S. CARNOW, *Respondent.*	No. 76-CH-36, 76-CH-37 Consolidated

AMENDED EXCEPTIONS TO REPORT OF HEARING BOARD AND REQUEST FOR LEAVE TO FILE BRIEFS AND FOR THE MAKING OF ORAL ARGUMENT.

NOW COMES the Respondent, DONALD S. CARNOW, by his attorneys, SCHIPPERS, BETAR, LAMENDELLA & O'BRIEN, and files his Exceptions to the Report of the Hearing Board and further Petitions and respectfully requests leave to file Briefs and to present oral argument.

Preliminary Statement

The Hearing Board has concluded that Respondent's conduct must result in the grave sanction of disbarment. In reaching that conclusion, the Board failed to consider the overriding fact that Respondent's actions were not voluntary but rather the result of duress.

Respondent was the victim of an extortion. He yielded to the demands of the extortionist only because of the fear he had that the extortionist would carry out threats to injure Respondent and his family.

Exceptions to Findings of Fact

Respondent respectfully suggests that the Findings of Fact entered by the Hearing Board are incomplete by virtue of omitting the following facts:

1. Respondent was engaged in the private practice of law for approximately 6 months when he became involved in the Pecord matter. He was then 26 years old and employed as an associate for Ben Rosenthal on a space for services basis. (Tr. 30, 156-157, 253, 371.)

2. On June 18, 1969, Stanley Zima met with Respondent and Ben Rosenthal. Zima informed Respondent and Rosenthal that Pecord's "Spot Zoning Petition" was doomed for disaster as the local Ward Committeeman was going to block it before the Committee on Building and Zoning. Zima stated that the members of the City Council Committee on Building and Zoning would grant the local Ward Committeeman aldermanic courtesy and that said Zoning Petition would be defeated. Zima said that he could help but that it would require the payment of attorney's fees and political contributions in the sum of $20,000.00 to $30,000.00, and that if said sums of money were made available, Pecord's Zoning change would not be blocked by the local Ward Committeeman. Respondent specifically rejected Zima's proposal. (Tr. 37-42, 86-90, 159-162, 366).

3. On June 20, 1969, public hearings were held on Pecord's petition. During the hearing, objections were made by the local Ward Committeeman and Pecord's petition was denied. (Tr. 90, 164-165).

4. Shortly after the public hearings referred to in paragraph 3, there were a series of threatening telephone calls from Zima to Respondent. The substance of what Zima said in these telephone calls was that unless Pecord used Zima's attorney and paid a fee of $20,000.00, Zima would see to it that Pecord would never obtain the zoning, that the nursing home would never be opened and that Pecord would be forced into bankruptcy. (Tr. 46-51, 180, 371-372).

5. On August 15, 1969, a meeting occurred between Zima, Rosenthal and Respondent. The substance of the conversation at that meeting was that Rosenthal and Respondent told Zima that they would withdraw from representation of Pecord. Zima replied, in essence, that they could not withdraw, that he had already incurred multiple obligations in the Pecord matter, and that he would see to it that his obligations were Respondent's obligations and that Rosenthal and Respondent must go ahead on the Pecord matter. Respondent and Rosenthal then stated that they regarded Zima's threats as an attempt to intimidate them and an extortion of Pecord and that if the threats continued, Respondent and Rosenthal would go to the Federal Bureau of Investigation. Zima repeated and persisted in his threats and stated that if the Federal Bureau of Investigation was informed of this matter neither Rosenthal nor Respondent would ever practice law again in the city of Chicago. (Tr. 56, 96-97, 196-198, 373-374).

6. Respondent took Zima's threat that Respondent would never practice law again in the most literal sense. Respondent's knowledge of Zima's reputation was that Zima had a history of inflicting severe physical injury upon anyone who opposed him in a matter of material interest to him. For many years Respondent had been a resident of the same community as Zima and had heard on many occasions that actual acts of physical violence were fostered and encouraged by Zima. By virtue of Zima's reputation, his conduct toward Respondent, the statements made to Respondent, and his interest in the Pecord matter, the state of Respondent's mind was that he then feared Zima would cause acts of physical violence to be inflicted upon him.

Respondent's testimony is illustrative of his state of mind:

> "I grew up in an area known as, 'South Shore Valley,' 'South Shore Gardens,' which was east of the South Chicago Community, and I went to high school and I lived

there and in my college years, and I came to know that community very well and ultimately became a member of that ward organization and there's a certain tenor and there's a certain mentality about that community that I can't describe, but I think it's best described—I don't know if you read the Chicago Guide. There's one or two articles, one in November, one in December, about Milltown, and there's a certain mentality. It's a very, very tough mentality. It's a labor union-type mentality wherein political campaigns, physical violence was not uncommon, and in that ward, being a member of that ward organization, I came to know that Zima had members of—members of his ward organization who I can best describe as labor [g]oons (sic). I'm not saying he caused harm to be done, but, you know, when your opposition in a political campaign suddenly find themselves with being assaulted or being involved in fights with bloodshed, and what have you, and a man sits back and tolerates it, he fosters it, he's primarily responsible for it, and those thoughts flashed in my mind and I believe that the people with whom he was associating could do physical harm, and as a result of it, I acquiesced." Tr. 374-375.

7. Subsequent to the August 15th meeting referred to in paragraph 5, in a conversation between Respondent and Rosenthal, Respondent informed Rosenthal that he was frightened. (Tr. 197-198).

8. Respondent then complied with Zima's demands because he feared for the safety of his family and his own safety. (Tr. 374-375).

9. In June and July, 1972, prior to the time Respondent discussed the Pecord matter with the agents, Zima told Respondent that there is an Internal Revenue Service investigation going on, that if Respondent should be contacted by the agents, Respondent better make sure that Zima's name never comes up, that Respondent tell Zima if he is questioned by the agents, and that Respondent say the right thing if he and his family wanted to remain healthy. At the time Respondent did tell Zima that

agents were investigating the Pecord matter. Zima specifically told Respondent to use the "deadman's story". Zima said "you tell them you gave it to Gardner if you know what's good for your safety, your family's safety . . . just make sure your health insurance is paid up." (Exhibit 1, pages 90-91)

10. On July 17, 1972, Respondent's automobile was burned in the driveway of his home. Respondent learned of this prior to meeting with the Internal Revenue Service agents that very day. (Tr. 384-387).

11. Respondent's state of mind became one of utter confusion and desperation caused both by fear and severe depression. Almost immediately after the fire in his automobile and seeing the agents, Respondent consulted Dr. William G. Fischer, a clinical psychologist. After the fire and while Respondent was consulting Dr. Fischer, Respondent received innumerable calls on his unlisted home telephone at all hours of the day and night. In the last week of August, 1972, a break-in was attempted at Respondent's home some time after midnight. Reference to brief excerpts of Respondent's testimony indicate the desperate mental state he was in at that time:

> "Threats had been made to me, and my family . . . I was so anguished that I took my family out of Chicago completely, . . . You know, I thought that the world was coming in on me" Tr. 396

12. The immunity order entered against Respondent was primarily utilized as a vehicle to obtain the speedy and totally committed cooperation of the Justice Department in protecting Respondent and his family. (Tr. 278-280).

13. During the entire period of Respondent's law practice, other than the Pecord matter, Respondent has always comported himself in a manner consistent with the highest traditions of the Bar. Respondent's reputation in the business and legal community is excellent and Respondent has willingly engaged in a vast number of *pro bono* matters and community interest cases.

(Tr. 109-110, 211-212, 220-221, 255-260, 266-268, 314-315, 318-319, 341-345, 352, 355-357).

14. During the period Respondent had first met with the agents, he was clinically depressed and, in the professional opinion of Dr. William Fischer, evidenced symptoms of mental processes and conduct consistent with that of a person whose actions were motivated by extreme fear. (Tr. 212-217)-.

Exceptions to the Conclusions of Law and Fact.

The conclusions and recommendations of the Hearing Board are essentially predicated on the concept that Respondent knowingly engaged in certain acts. By and large, Respondent agrees with the conclusions that certain apparent unethical acts were done with his knowledge. However, it is respectfully submitted that the Board has failed to recognize that culpability requires "willfulness". A willful act requires not only that the act be knowingly performed but that it be voluntarily performed. The act of a bank teller in handing money to one who demands it while pointing a Thompson submachine gun at the bank teller is admittedly done knowingly but certainly not a voluntary act. Acts committed, therefore, under actual or threatened duress, coercion, physical force, or other compulsion do not subject the actor to accountability.

Respondent respectfully submits that under the peculiar factual circumstances the recommendation of the Hearing Panel to disbar him is cruel, harsh and extreme. Respondent was the victim of an extortion who, by virtue of the threats made against him and the fear those threats generated, involuntarily engaged in acts which are as repugnant to him as they are to the Hearing Board. However, the extreme sanction of disbarment must not be imposed against one who, by all standards of justice, was an unwilling victim of the criminal conduct of another.

Request for Briefs and Oral Argument.

It is respectfully suggested, because of the unusual nature of this case and because of the recommendation of the Hearing Board, that a briefing schedule be set and oral argument permitted. The Review Board's attention is respectfully directed to two cases which highlight the severity of the sanctions proposed against Respondent and which further serve to illustrate the fact that Respondent's case is *sui generis*. *In Re Leonard*, 64 Ill. 2d 398 (1976) involved an Attorney who was suspended after the establishment of a continuous course of conduct, conviction of the crimes of bribery and mail fraud, and a long standing series of acts involving moral turpitude. *In Re Bourgeois*, 25 Ill. 2d 47 dealt with an attorney who was suspended for embezzling funds but who established such acts were carried out under emotional distress.

The Review Board must, it is respectfully suggested, prior to ruling, be fully aware of all relevant disciplinary cases and the law relating to extortion and accountability. We again urge, therefore, that briefs and oral argument be permitted.

Respectfully submitted,

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APPENDIX C-1

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

In the matter of: BENJAMIN JULIAN ROSENTHAL, *Respondent.*	No. 76-CH-36 76-CH-37 Consolidated

EXCEPTIONS TO REPORT OF REVIEW BOARD, PETITION FOR LEAVE TO FILE ADDITIONAL EXCEPTIONS AND REQUEST FOR LEAVE TO FILE BRIEFS AND FOR THE MAKING OF ORAL ARGUMENT.

Now Comes Respondent, Benjamin Julian Rosenthal, by his attorney, Barry J. Freeman, and files his exceptions to the Report of the Review Board, requests twenty-one (21) days' leave to file additional exceptions, requests leave for the filing of briefs, and requests oral argument in this cause, or in the alternative for an Order reversing and dismissing the Complaint herein.

Exceptions to Report of Review Board and Recommendation of the Review Board

Respondent, pursuant to Supreme Court Rule 354, incorporates by reference his exceptions to the Report of the Hearing Panel heretofore filed with the Review Board. For purpose of convenience, a copy is attached hereto and incorporated herein.*

Request for Leave of Court for an Additional Twenty-One (21) Days to File Further Exceptions

Respondent respectfully requests leave of Court to file further additional exceptions in this matter and for his reason

* Attachment is not included in this Appendix.

states that his attorney, Barry J. Freeman, has been actively engaged in the preparation of several briefs and since October 4, 1977 has been unable to give appropriate time to the review of the record and preparation of detailed exceptions in this cause.

Request for Briefs and the Making of Oral Argument

It is respectfully submitted, because of the unusual nature of this case and because of the harsh, anomalous and perplexing recommendation that a briefing schedule be set and oral argument be permitted. For purpose of convenience, a copy of Respondents' Brief filed before the Review Board is attached hereto and incorporated herein.

/s/ BARRY J. FREEMAN
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APPENDIX C-2

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

In the matter of:	No. 76-CH-36
BENJAMIN JULIAN ROSENTHAL,	76-CH-37
Respondent.	Consolidated

BENJAMIN JULIAN ROSENTHAL'S EXCEPTIONS TO THE REPORT AND RECOMMENDATION OF THE REVIEW BOARD

The Report and Recommendations of the Review Board is defective and erroneous in the following particulars:

1. The Review Board, like the Hearing Panel, totally ignores all evidence of character and background as well as all mitigating factors surrounding the facts of this matter, in reaching its decision to affirm the Panel's recommendation of disbarment. The policy of the Review Board, as expressed by counsel for the Administrator during oral argument before this Court on September 15, 1977 in *In re: Kein* (Docket No. 49417), to disbar an attorney any time he is involved in the payment of money, is apparently the cause of the Board's persistence in ignoring facts in mitigation. This policy is contrary to the clear precedent established by the Supreme Court. See *In re Costigan* (1976), 63 Ill. 2d 230, 236-37; *In re Lee Marshall* (1977), Slip Opinion—Docket No. 48892, p. 7.

2. The Review Board reiterates the erroneous conclusion of the Hearing Panel that Respondents knowingly counseled, assisted and participated in conduct which resulted in the extortion which was perpetrated against their client. The Board also finds that Respondents' position, that their acts in this regard were not performed wilfully, is unsupported by the evi-

dence. This finding by the Review Board ignores Finding of Fact number 6 of the Hearing Panel that "Respondents maintain and it is probably believable that they and their families were threatened by Zima with economic and bodily harm and that their client was threatened".

3. The Review Board concludes that, "Participation by an attorney in extortion is an offense which warrants disbarment . . ." This is a sweeping statement which in this case encompasses attorneys who were themselves victims of the extortion, and who, through threat of physical and economic force against themselves and their client, were compelled to participate. The Review Board, like the Hearing Panel, fails to make the distinction between attorneys who participate as aiders and abettors of the extortion as opposed to those who participate as victims. The record of these proceedings firmly establishes that Respondents fall within the latter description of "participants".

Respectfully submitted,

/s/ BARRY J. FREEMAN
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APPENDIX D

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

In the matter of: DONALD S. CARNOW, *Respondent.*	No. 76-CH-36 76-CH-37 Consolidated

EXCEPTIONS TO REPORT OF REVIEW BOARD AND REQUEST FOR LEAVE TO FILE BRIEFS AND FOR THE MAKING OF ORAL ARGUMENT

To: The Honorable Justices of the
Supreme Court of the State of Illinois

Now Comes the Respondent, Donald S. Carnow, by his attorneys, Schippers, Betar, Lamendella & O'Brien, and files his Exceptions to the Report of the Review Board and further petitions and respectfully requests leave to file Briefs and to present oral argument, or in the alternative, for an Order reversing and dismissing the Complaint.

Preliminary Statement

The Review Board has concluded that Respondent's conduct must result in the grave sanction of disbarment. In reaching that conclusion, the Review Board failed to consider the overriding fact that Respondent's actions were caused by threats of physical and economic harm to himself and his family. Respondent was the victim of extortion. He yielded to the demands of the extortionist to prevent physical and economic harm to himself and his family, and not to influence anyone or for assurances of favorable zoning treatment. Nevertheless, as a policy matter, the Review Board has taken the posture, as was

stated by Counsel for the Administrator during oral argument before this Court in *In re: Kein* (Docket No. 49417—argued September 15, 1977—decision pending), that anytime an attorney is involved in the payment of money, he should be disbarred regardless of the circumstances.[1] This view as will be seen is ludicrous. There are two aspects to the transmission of money—the payment and receipt. The fact that the recipient of the money has committed an illegal act, i.e. extortion, does not change the fact that the payment is justifiable, and not subject to sanction.

It was found as fact by the Hearing Panel that Respondents were the victims of extortion. However, the Review Board ignored this vital and compelling distinction which resulted in the anomalous, and startling decision which now confronts this Honorable Court. The Board's use of a shotgun in a situation which requires the use of a scalpel is appalling. One must look to the man in the particular setting; the reason for the conduct; and the nature of his character before imposing the grave sanction of disbarment. "The doctrine of Stare Decisis cannot really be applied to the particular discipline meted out in any particular case, as the conduct of each Respondent must be judged individually and the discipline in each case must turn upon the particular factual situation presented." *In re: Nesselson*, 35 Ill. 2d 454, 461. *In re: Leonard*, 64 Ill. 2d 398. Here, Respondent's sole intent was to protect himself and his family from physical harm. He did not seek to influence anyone nor did he intend to engage in any fraudulent, dishonest or corrupt practices.

1. The February 28, 1977 *Kein* Decision of the Review Board antedated the Hearing Panel's report in this case. Though the Hearing, here, before the Hearing Panel closed December 2, 1976, it took four and one-half (4½) months for a decision. The date of the Hearing Board's report, here, is April 19, 1977. Respondent concludes that the Review Board's *Kein* recommendation to disbar (greatly increasing the *Kein* Hearing Panel's recommendation of a thirty (30) day suspension), brought about this Hearing Panel's recommendation to disbar. There is no other lurking or underlying reason, except the Review Board's ludicrous policy position now before the Court.

Exceptions to Findings of Fact

Respondent respectfully suggests that the Findings of Fact entered by the Hearing Board and affirmed by the Review Board are incomplete by virtue of omitting the following:

1. Respondent was engaged in the private practice of law for only six (6) months when he became involved in the Pecord matter. He was then 26 years old and employed as an associate for Ben J. Rosenthal on a space for service basis. (Tr. 30, 156-157, 253, 371). Pecord had not been Carnow's client; Carnow never billed for his time nor did he receive a fee for this matter; he acted in a subordinate role, more or less as a law clerk; and had desired to report the extortion but had been dissuaded in a conversation with Rosenthal[2], (see paragraph 8), and further feared that a police investigation which might not lead to a prosecution because of evidentiary problems, would alert Zima and would endanger himself and his family.

2. On June 18, 1969, Stanley Zima met with Respondent and Ben Rosenthal on the pretext that he wanted to offer friendly advice. Zima informed Rosenthal and Respondent that Pecord's "Spot Zoning Petition" was doomed for disaster as the Local Ward Committeeman was going to block it before the Committee on Building and Zoning.

Zima stated that the members of the City Council Committee on Building and Zoning would grant the Local Ward Committeeman aldermanic courtesy and that said Zoning Petition would be defeated. Zima said that he could "help" but that it would require the payment of attorney's fees and political contributions in the sum of $20,000.00 to $30,000.00, and that if said

2. On or about August 16 or 17, 1969, Rosenthal had sought to withdraw from representing Pecord but had later concurred with his client that it would be immoral and unhumanistic to abandon a client facing bankruptcy due to the gun of the extortionist, and a breach of the attorney-client privilege to reveal confidences. Carnow considered Rosenthal, being older and more experienced, to be scholarly, trusted him and looked to him as a mentor. Being fearful and confused, Carnow relied upon Rosenthal.

sums of money were made available, Pecord's Zoning change would not be blocked in the City Council by the Local Ward Committeeman and Alderman. Both Respondents specifically rejected Zima's proposal. (Tr. 37-42, 86-90, 159-162, 366).

3. On June 20, 1969, public hearings were held on Pecord's petition. During the hearing, objections were made by the Local Ward Committeeman and Pecord's petition was deferred. (Tr. 90, 164-165). The effect of the deferral was substantively a denial but without a right to resort to the court system by Pecord.

4. Thereafter the Chicago City Council enacted an ordinance on June 27, 1969 preempting its own jurisdiction to grant "nursing home" zoning variances, and classifying such requests as "special uses". This special use jurisdiction was delegated to an administrative agency known as the Chicago Board of Zoning Appeals. The Chicago City Council thus created an administrative remedy for one seeking a "nursing home" use. The Respondents did not merely choose to pursue this remedy in July, 1969, but were compelled to exhaust such remedy as a condition of later seeking judicial relief for Pecord.

5. Shortly after the public hearings referred to in paragraph 3, but before the filing of Pecord's Special Use Request, there were a series of threatening telephone calls from Zima to Respondent. The substance of what Zima said in these telephone calls was that unless Pecord used Zima's attorney and paid a fee of $20,000.00, Zima would see to it that Pecord would never obtain the zoning, that the nursing home would never be opened and that Pecord would be forced into bankruptcy. (Tr. 46-51, 180, 371-372).

6. On August 15, 1969, a meeting occurred between Zima, Rosenthal and Respondent. The substance of the conversation at that meeting was that Rosenthal and Respondent told Zima that they were withdrawing from representation of Pecord because Zima's Special Zoning Counsel" appeared to be a hoax. Zima replied, in essence, that they could not withdraw, that he

had already incurred multiple obligations in the Pecord matter, and that he would see to it that his obligations were Respondent's obligations and that Rosenthal and Respondent must go ahead on the Pecord matter. Rosenthal then stated that he regarded Zima's threats as an attempt to intimidate him and an extortion of Pecord and that if the threats continued, Rosenthal would go to the Federal Bureau of Investigation. Zima repeated and persisted in his threats and stated that if the Federal Bureau of Investigation was informed of this matter neither Rosenthal nor Respondent would ever practice law again in the City of Chicago. (Tr. 56, 96-97, 196-198, 373-374.)

7. Respondent took the threats that "my obligations are your obligations" and that "you will never practice law again in the City of Chicago" to mean that the extortionist meant to make Carnow pay economically, physically or both. Respondent's knowledge of Zima's reputation was that Zima had a history of inflicting severe physical injury upon anyone opposed to him in a matter of material interest to him.[3] For many years Respondent had been a resident of the same community as Zima and had heard on many occasions that actual acts of physical violence were fostered and encouraged by Zima. By virtue of Zima's reputation; his conduct toward Respondent; the statements to Respondent; and Zima's interest in the Pecord matter, the state of Respondent's mind was that he then feared Zima would cause acts of physical violence to be inflicted upon him.

Respondent's testimony is illustrative of his state of mind:

> "I grew up in an area known as 'South Shore Valley', South Shore Gardens', which was east of the South Chicago Community and I went to high school and I lived there and in my college years, and I came to know that community very well and ultimately because a member of that ward organization and there's a certain tenor and there's a certain mentality about that community that I can't describe, but I think it's best described—I don't know if you read the Chicago Guide. There's one or two articles, one in November, one in December about Milltown, and there's a certain mentality. It's a very very tough mentality. It's a labor union-type mentality wherein political campaigns, physical violence was not uncommon, and in that ward, being a member of that ward organization, I came to know that Zima had members of—members of his ward organization who I can best describe as labor (g)oons (sic). I'm not saying he caused harm to be done, but, you know, when your opposition in a political campaign suddenly finds themselves with being assaulted or being involved in fights with bloodshed, and what have you, and a man sits back and tolerates it, he fosters it, he's primarily responsible for it, and those thoughts flashed in my mind and I believe that the people with whom he was associating could do physical harm, and as a result of it, I acquiesced." (Tr. 374-375).

3. Respondent's initial meeting with Zima at City Hall was a fluke. Carnow believed that Zima was only performing his official duties in providing procedural advice about City Council proceedings and was being genuinely friendly until there came a time in June, 1969, when it became evident that Zima had marked Pecord for a "Quick Buck" and extortion. Except in an instance where Carnow had been instructed by Rosenthal to find out what Pecord was up against, Respondent endeavored to cut-off all contact with Zima but found himself stalked as hunter stalks game. Zima found his mark in Mr. Carnow and exploited it fully.

8. Just after the August 15th meeting and in a conversation between Respondent and Rosenthal, Respondent informed Rosenthal that he was frightened and wanted to report the extortion notwithstanding the attorney-client privilege and the confidential relationship embodied in Cannon 4. (Tr. 197-198). Rosenthal then sought to withdraw but later concurred with his client, Joseph Pecord, that it would be immoral and unhumanistic to abandon a client when he faced bankruptcy and other harm because of the acts of an extortionist and that it would be a breach of the attorney-client privilege to divulge the client's confidence. (Tr. 132-135) Carnow considered Rosenthal being an older, more experienced attorney, to be scholarly, trusted him and looked to him as a mentor and teacher. Thereafter Carnow was "middled" by the client's plea not to abandon and the threats of the extortionist.

9. Respondent complied with Zima's demands because he wanted to prevent physical injury to himself and his family. (Tr. 374-375). There is nothing in the record which even slightly suggests that Respondent sought to influence the outcome of the Hearing.

10. In June and July, 1972, prior to the time Respondent discussed the Pecord matter with the agents, Zima sought out and told Respondent that there was an Internal Revenue Service investigation going on, that if Respondent should be contacted by the agents, Respondent better make sure that Zima's name never comes up, that Respondent tell Zima if he is questioned by the agents, and that Respondent say the right thing if he and his family wanted to remain healthy. During a chance encounter in early July, Respondent did tell Zima that agents were investigating the Pecord matter. Zima specifically told Respondent to use a "deadman's story". Zima said "you tell them you gave it to Garner, if you know what's good for your safety, your family's safety . . ." (Exhibit 1, pages 90-91).

11. On July 17, 1972, Respondent's automobile was severely burned in the driveway of his home; not by mere coincidence, this occurred on the very day of Mr. Carnow's meeting with the Internal Revenue Service agents. (Tr. 384-387).

12. Respondent's state of mind became one of utter confusion and desperation caused by both fear and severe depression. Almost immediately after the fire in his automobile and after seeing the agents, Respondent consulted Dr. William G. Fischer, a clinical psychologist. After the fire and while Respondent was consulting Dr. Fischer, Respondent received innumerable calls on his unlisted home telephone at all hours of the day and night. In the last week of August, 1972, a break-in was attempted at Respondent's home some time after midnight. Reference to brief excerpts of Respondent's testimony indicate the desperate mental state he was in at that time:

> "Threats had been made to me, and my family . . . I was so anguished that I took my family out of Chicago completely, . . . You know, I thought the world was coming in on me" (Tr. 396).

13. During the period Respondent had first met with the agents, he was clinically depressed and, in the professional opinion of Dr. William Fischer, evidenced symptoms of mental processes and conduct consistent with that of a person whose actions were motivated by extreme fear. (Tr. 212-217).

14. The immunity order entered against Respondent was primarily utilized as a vehicle by counsel, Joseph Lamendella, to obtain the speedy and totally committed cooperation of the Justice Department in protecting Respondent and his family. (Tr. 278-280) Such protection was committed.

15. During the entire period of Respondent's law practice, other than the Record matter, Respondent has always comported himself in a manner consistent with the highest tradition of the Bar. Respondent's reputation in the business and legal community is excellent and Respondent has willingly engaged in a vast number of *pro bono* matters and community interest cases to and including this day. (Tr. 109-110, 211-212, 220-221, 255-260, 266-268, 314-315, 318-319, 341-345, 352, 355-357). Respondent has also undertaken service to his community by serving on many Committees of the Bar, Community Groups and religious organizations.

Exceptions to the Conclusions of Law and Fact

1. The Review Board erred in applying the doctrine of *Stare Decisis* in applying its own February 28, 1977 *Kein* Decision (In re: *Kein*, Supreme Court Docket No. 49417—Decision pending—argued September 15, 1977) to this case and effectively holding that *under any circumstances* an attorney must be disbarred when he is involved in the payment of money. One must look to the man in the setting; the reason for the conduct; and the nature of his character. The doctrine of *Stare Decisis* can not be applied to attorney disciplinary matters. *In re: Nesselson*, 35 Ill. 2d 454, 461.

2. The conclusions and recommendations of the Review Board and Hearing Board are implicitly predicated on the concept that Respondent intentionally engaged in certain acts. However, the Administrator neither pleaded nor proved by clear and convincing evidence that Respondent's conduct was the product of fraudulent, dishonest or corrupt intent or motives. Respondent respectfully submits the failure to plead is violative of Respondent's 14th Amendment substantive due process rights and is a fatal error. *In re: Smith,* 356 Ill. 11 5 N. E. 2d 227. The clear and convincing evidence is that Respondent did not seek to influence the outcome of the Zoning Hearing. Rather his participation under severe emotional stress was to prevent physical and economic injury to himself, his wife and his children.

3. It is respectfully submitted that the Review Board and Hearing Board have failed to recognize that culpability requires "intent". A willful act requires not only that the act be intentionally performed but that it be voluntarily performed. Acts committed, under actual or threatened duress, coercion, physical force, or other compulsion ought not subject the actor to accountability.

4. In the absence of a clearly applicable statute requiring disclosure, or an intent on the part of a client to commit a crime, the attorney-client privilege prevents divulging client confidences. Respondent respectfully submits that under the peculiar factual circumstances, the recommendation of the Review Board to disbar is cruel, harsh and extreme. Respondent was the victim of an extortion who, by virtue of the threats made against him and the fear those threats generated, engaged in acts to prevent injury to himself, his wife and children.

5. The extreme sanction of disbarment should not be imposed against one who by all standards of justice, was the unwitting victim of the criminal conduct of another. Consideration should be given to the following facts:

A. Zima was adjudicated an extortionist by a jury of his peers.

B. Respondent's conduct was activated by fear and he yielded to Zima's demands to prevent physical and economic injury to himself, his wife and children.

C. Respondent never sought to influence the Hearing before the Chicago Board of Zoning Appeals, nor did his conduct obstruct the administration of justice of that agency.

D. After breaking the yoke of fear, Respondent's testimony aided the administration of Justice in the bringing about of the conviction of the extortionist.

E. The Hearing Board accepted all of Respondent's proofs of the merits of the Zoning Request, Respondent's attempts to withdraw, and efforts to avoid the extortionist.

F. Respondent was a mere youth of 26 years old in 1969, was engaged in private practice only six (6) months and licensed a little more than one (1) year at the time of the incident.

G. Joseph Pecord had not been Carnow's client.

H. Carnow's role was that of a subordinate or more nearly a law clerk.

I. Carnow never billed nor did he receive a fee for his activities.

J. Carnow relied upon the advice and opinion of Rosenthal, an older attorney, whom he viewed as a mentor and teacher in preserving the attorney-client privilege in not divulging confidences.

K. When a client was extorted and in a different setting, the Respondents reported the matter to the United States Attorneys Office in 1973.

L. Carnow's reputation in the business and legal community is excellent as attested to by his ten (10) character witnesses and thirty (30) Affidavits. He has served on numerous boards and committees of community organizations.

M. Respondent has unselfishly engaged in a vast number of *pro bono* matters and community interest cases, and

N. That Respondent has never had a previous complaint at the Bar.

6. The Complaint filed against the Respondent is predicated upon Supreme Court Rule 752, A. R. D. C. Rule 1-1 and D. R. 1-102(A)(5) and (6), Illinois Code of Professional Responsibility, which gives rise to the authority to discipline "conduct of attorneys which tends to defeat the administration of Justice or to bring the courts or the legal profession into disrepute." This standard has been unconstitutionally applied to the Respondent, and thus violative of Respondent's 14th Amendment Right to substantive due process of law in that the Complaint failed to plead "intent" to perform a fraudulent, dishonest or corrupt practice as an essential element thereof. See *In re: Ruffalo,* 390 U. S. 544. Substantive due process is required as a matter of law in attorney disciplinary proceedings.

Request for Brief and Oral Argument

It is respectfully suggested, because of the unusual nature of this case and because of the harsh recommendation that a briefing schedule be set and oral argument permitted. In support thereof, Respondent incorporates by reference his brief filed with the Review Board. For purposes of convenience, a copy is attached hereto and incorporated herein.*

Respectfully submitted,

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* Attachment is not included in this Appendix.

APPENDIX E

No. 50098

IN THE SUPREME COURT OF ILLINOIS

In the Matter of
BENJAMIN JULIAN ROSENTHAL,
Attorney-Respondent.

Administrator's Decision No. 76-CH-36 +37 Consolidated Appeal from Disciplinary Commission.

PETITION FOR REHEARING

Introduction

This matter came before this Court as a result of disciplinary proceeding brought before the Attorney Registration and Disciplinary Commission. By its decision, this Court sustained the recommendation of the Commission that Respondents be disbarred.

Respondent's Penalty Should be Reconsidered

On page 3 of the slip opinion issued in this case, the Court states as part of its factual recitation as follows:

> "Zima informed the respondents that there would be no special counsel and that his 'obligations' were now theirs. Rosenthal objected and indicated that he would go to Federal Authorities, to which Zima responded that if Rosenthal did so, he and Carnow would never again practice law in the City of Chicago."

Through ironical happenstance Zima's threats have come to pass.

As it happened, Rosenthal and Carnow cooperated with the government prosecution and testified against Zima. As a result,

the United States Attorney in his August 7, 1975 letter to the Disciplinary Commission wrote:

> "Mr. Rosenthal was truthful at all times with agents of the Government, and likewise was readily available to assist us during our preparation for trial."

As an additional result of Respondent's cooperation with the United States Attorney's Office, the Disciplinary Commission was able to bring this matter to the Illinois Supreme Court upon a recommendation of disbarment. Respondent now faces the harsh reality of Zima's threat.

The Circumstances of This Case Do Not Warrant Disbarment

The harshness of the disciplinary measure exacted upon Respondent is impossible to rationalize in light of the many mitigating circumstances in this case.

> "The disbarment of an attorney is the destruction of his professional life, his character, and his livelihood . . . The court should therefore disbar in moderation . . ." *In re Fisher*, 15 Ill.2d 139; 154 (1958).
>
> "Such duty (to protect the public from improper practices), and the manner in which it is exercised, must not be despotic . . . The courts must not exercise their supervisory control in an arbitrary manner, but must show a legal discretion in the exercise thereof." *In re Donaghy*, 402 Ill. 120 (1948).

Neither the Disciplinary Commission's charges nor the evidence in the record could sustain a finding that Rosenthal and Carnow were guilty of the crime of bribery or extortion. In light of all Illinois precedent, only such a conviction (or a definitive disciplinary charge of those crimes with sufficient evidentiary support) could warrant the ultimate discipline exacted in this case.

If it is implicit in the Court's opinion that Respondents were guilty of extortion or bribery, then Respondents have been deprived of their fundamental Sixth Amendment right to know the

nature of the accusations against which they must defend. *In re John Ruffalo, Jr.*, 390 U. S. 544 (1968).

If it was not the intent of this Court's opinion to imply that Respondents were guilty of extortion or bribery, this Court, in deciding to disbar Respondents must have overlooked the multitude of mitigating elements which clearly emerge from the record. For instance:

1. This matter was an isolated incident which occurred in 1969. Neither prior to that time nor since that time have Respondents tainted their otherwise spotless careers. In fact, prior to the Zima extortion, they and their client, Pecord, refused to buckle under to the demands of John Daley (which caused them the loss of that project) (see Abstract, pp. 88-89); and after the Zima incident, they brought another client, Norman Katz, directly to the U. S. Attorney's Office to report an attempted extortion (which resulted in a declined prosecution) (see Abstract, pp. 204-205).

2. Respondent throughout the Zima extortion had advised his client not to give in, and always expressed opposition to the course of action finally taken (see Abstract, pp. 77-80, 87-88;[1] see also p. 60 of the Supplemental Abstract).

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1. It may be helpful here to reproduce the abstracted testimony of Thomas Gordon which appears on Abstract pages 87 and 88:

> "I did have occasion to meet Ben Rosenthal and Joe Pecord in the period of July and August, 1969. Only Pecord and Rosenthal were present.
>
> "At that time, Pecord was very, very distressed that he was being extorted for monies for zoning. He wanted Rosenthal to implement the zoning however he could. There was a discussion that there would be other counsel involved. Rosenthal indicated to Pecord that he should go to FSLIC or some other government agency and get an extension of time. Rosenthal said he did not agree that the passing of money was a way to do it; that Pecord was insisting that he had no time; and that time had run out; and that he, Rosenthal, was not the one to handle the situation on that basis. So there was much arguing back and forth. Rosenthal, at that meeting offered to go to Washington with Pecord to see if he could implement a kind of extension with FSLIC.

(Footnote continued on next page.)

3. Respondent throughout the Zima affair acted completely without personal profit motive.

4. The only motive behind the payment to Zima was to achieve a zoning variance *to which they were legally entitled.* It was not to achieve the obstruction of justice but to remove such obstruction.

5. Respondent's participation in this matter was strictly for the benefit of his client, who stood to face personal bankruptcy if the zoning was not obtained, in light of the FSLIC's refusal to grant an extension of time sufficient for a court action. (See Supp. Abst., p. 60; Abstract, p. 87).

6. Respondent was advised he could not abandon his client in such circumstances. (See Abstract, pp. 158-159).

7. Respondent received threats by Zima, not only against himself, but also his family, if Respondent did not go along with Zima's program.

8. Respondent is praised and endorsed by his peers and many clients through testimony and affidavits, which appear in the record. (See Supp. Abstract, pp. 76-98, 125-130; Abstract, pp. 174-223.)

9. Respondent has had an exemplary legal career, participating in many community endeavors, reflecting therefore to the benefit of his profession.

If these mitigating facts have not been taken into consideration, the Respondent implores this Honorable Court to do so and to reconsider its decision which is tantamount to professional capital punishment.

(Footnote continued from preceding page.)

> Rosenthal suggested strongly that they go into the courts and bring this thing out into the open and that was the only way he could handle it. Pecord indicated that he knew these people, he had dealt with them before, and that it was a personal animosity between him and (John) Daley. Pecord said he just knew that this thing was going to die, that it was not going to get extended, and that he had explored that to the best of his ability."

If, in fact, these elements have been taken into consideration, and the Court declines to modify the decision to disbar Respondent, then such punishment is cruel and unusual and in violation of Respondent's 14th Amendment right to equal protection under the law, as well as in violation of his 8th Amendment right to be protected from cruel and unusual punishment.

There is no disciplinary precedent for disbarment, especially in this case in the face of the mitigating factors outlined above.

We must repeat a quote from *In re Leonard,* 64 Ill. 2d 39 (1976):

> "We recognize . . . that our disciplinary system must not become mechanistic, ignoring the significance of mitigating factors. Except for respondent's involvement in the present situation, his record of personal and professional service exemplifies a commitment and an awareness of the highest ethical standards."

Why does this learned language not apply to the matter of Benjamin J. Rosenthal? Leonard entered a plea of guilty to conspiracy to promote the bribery of Paul Powell and to assist in the preparation of fraudulent income tax returns. He was suspended for three years (retroactive to the date of his voluntary withdrawal from the practice of law). *In re Kayne,* 53 Ill. 2d 410 (1973), dealt with Kayne's bribery of an Internal Revenue Agent; Kayne was suspended for one year. *In re Kien,* 69 Ill. 2d 355 (1968), dealt with the bribery and subordination of perjury of a police officer; Kein was suspended for eighteen months. *In re Walker,* Ill. 2d 48 (1977), dealt with an attorney found guilty of filing false income tax returns; Walker was only censured for this offense. *In re Cook,* 67 Ill. 2d 26 (1977), Cook had perjured himself for his own benefit and aided and abetted the cover-up of an illegal $250,000 cash contribution; he was suspended for only sixteen months. *In re Sherre,* 68 Ill. 2d 56 (1978), Sherre was convicted of four counts of mail fraud; Sherre was suspended for three years.

See also other attorney-bribery cases: *In re Ellis,* 371 Ill. 113 (1939), where the attorney was suspended for two years for making several campaign contributions to the Chairman of the State Tax Commission on behalf of a client; *In re Tuttle,* 371 Ill. 153 (1939), where the attorney was suspended for two years for engaging in a course of conduct involving the bribery of the head of the State Tax Commission; *In re Huff,* 371 Ill. 198 (1939), Huff was suspended for two years for payment of bribes to the Chairman of the State Tax Commission; *In re Howard,* 69 Ill. 2d 343 (1978), dealt with an attorney bribing a policy officer with intent to influence his testimony; for stating that other payments would be paid to influence the prosecutor and Judge and for lying before the Review Board; Howard was suspended for three years.

The New York Court suspended two attorneys for six months for bribing an Internal Revenue Agent to decrease the unreported income of a client, for which they served two weeks in prison on a plea of guilty. (*In re Fenton,* 313 NYS 2d 636 (1970). The New York Court took into consideration the fact that no other complaints had ever been filed against the attorneys, who previously had enjoyed an excellent reputation and the fact that they only received a $100 fee for their work. Rosenthal received no fee from his client in the case at bar for his zoning efforts, has an excellent reputation—legally and personally—and has always given generously of his time to his clients and the community.

In another New York case, *In re Goldstein,* 320 NYS 2d (1971), an attorney was suspended for three years for making 64 bribery payments over an extended period of time to Internal Revenue Agents assigned to audit his clients. The suspension was given in light of Goldstein's cooperating with the United States Attorney's Office and in light of his prior record as an attorney.

Except for the case of *In re Schwarz,* 51 Ill. 2d 334 (1972), where it was proven that respondent engaged in a pattern of

payoffs to a Judge to encourage the obstruction of justice, no case involving official bribery had resulted in disciplining an attorney exceeding a three-year suspension. In light of the 1978 case of *In re Sherre,* 68 Ill. 2d 56 (1978), where the court only suspended Sherre for three years in the fact of his conviction on four counts of mail fraud, disbarment in the instant case seems irresoncilably severe. We point to *In re Kien* as the most recent case involving the payment of monies to a public official. Kien was suspended for 18 months. Under the facts of the instant case, and in light of all the mitigating circumstances, rationale dictates that Rosenthal's penalty should be minimal. Certainly the Court must recognize that this unfortunate incident occurred nine years ago, with Respondent's conduct being exemplary since that time. He has obviously become totally rehabilitated since 1969, and the Court should place major importance on this fact.

Respondent was not charged with bribery or extortion; was never previously involved before or since Zima; did not act for his own benefit with respect to the Zima payment; and in no way sought to obstruct justice or obtain anything other than that to which his client was legally entitled. Respondent's career has otherwise been laudable. Respondent's cooperation with the Department of Justice brought about Zima's conviction. It should not now be the cause of his disbarment.

Conclusion

Respondent prays that this Honorable Court reconsider its decision, and that Benjamin Julian Rosenthal be allowed to continue in the practice of law.

Respectfully submitted,

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APPENDIX F

IN THE SUPREME COURT OF ILLINOIS

In the Matter of DONALD S. CARNOW, *Attorney-Respondent.*	Administrator's Decision No. 76-CH-36 + 37 Consolidated Appeal from Disciplinary Commission

PETITION FOR REHEARING

May it please the Court:

A judgment of disbarment is the professional equivalent of a capital penalty. We would suppose, therefore, that it is likely that petitions for rehearing are filed in all such cases.

Statistical experience augurs poorly for such petitions. We think it appropriate, therefore, to offer a preface: this is not a routine petition.

Brevity is commanded by Rule 367. It is also dictated by reason itself. We will not yield to the desire or temptation to reargue the case. Instead we proceed directly to the gravest of issues.

The Penalty

The opinion states that the Court finds basis for mitigation of the penalty imposed on respondent Carnow (slip opinion, p. 7). On that basis we feel free to urge, respectfully but vigorously, that it is clearly wrong to impose upon him the ultimate penalty. That is a penalty which, by definition, is reserved for cases

where mitigation is not to be found. And it exists here in abundance, past accomplishments aside.

Respondent gave false information to a federal agent; but with his car set afire on the morning of the appointment with the agent, what assurance could respondent have there were no leaks in the federal investigative chain? The Court points out that there had been other automobile fires in that area; but there is no evidence that such fact had come to Carnow's attention. So far as he knew, he had been singled out to receive a warning. If he had a duty to the federal government, he also had a duty to his wife and children. If this Court feels that he guessed wrong, it should not treat the offense as capital.

While respondent had a duty to the federal government, he also had one to his client. Petitioner perceived a codified obligation of balance going far beyond confidential communications. He was bound to withhold information "the disclosure of which would be embarrassing or would be likely to be detrimental to the client" (Dr. 4-10). The client would literally lose his shirt if denied the rezoning to which he was clearly entitled. He would be denied that rezoning unless Zima were paid. Complaint could be made of Zima's activities only at the expense of the client's financial ruin. Again, if respondent made the wrong choice, the penalty should not be capital.

Respondents did not initiate the course of misconduct. They found themselves in a totally corrupt milieu. Indeed, Carnow originally undertook only ministerial duties in respect to the rezoning, acting essentially as a messenger in a space-for-services arrangement. If Carnow's response was less heroic than might have been wished, it is equally true that he made *no* policy decisions in the matter.

* * * * *

It is probably true that most extortion schemes involve attorneys (slip opinion, p. 6). That fact, however, is due to the circumstance that most victims become vulnerable to official ex-

tortion precisely because they are in situations requiring legal service. The direction of the extortive activity against the attorney reflects a cynical awareness that he dare not complain lest he render himself vulnerable to professional retaliation by the extortionist and his then political cronies.

It was not, however, professional concerns alone which counselled silence to the petitioner. The matter went much further: direct and realistic threats against the persons of his wife and children. Perhaps the ideal response would have been a refusal to knuckle under; but a failure to rise to that level of valor does not merit disbarment.

The Court cited *U. S.* v. *Kahn,* 472 F. 2d 272, for the proposition that surrender to illegal coercion should not be "a *total* defense to bribery chrarges". (slip opinion, p. 6, emphasis added) Implicit in the quoted language is the proposition that with equal force, such yielding to the force of circumstance does not constitute "total" guilt.

* * * * *

It should also be remembered that we are talking about stale facts. The transaction with Zima occurred nine years ago. Conversation with the federal agents occurred in 1972.

The transaction with Zima was an isolated incident, in no way reflective of a pattern in the respondent's practice.

For many years following the last of those events, respondent has practiced law honorably and has given no grounds for complaint.

If there was culpability, there is also total rehabilitation.

Any rational penalty must take account of that fact.

* * * * *

Mitigating factors abound in this record; the penalty should reflect those factors.

The Nature of the Offense

The last observation made above suggests yet another serious issue. It is, we suggest, quite telling that the administrator charged respondents with "participation in and facilitation of an *extortion* scheme" (slip opinion, p. 1, emphasis added) while the opinion reflects a judgment that the respondent has committed an act of *bribery.*

Clearly, the respondent paid no bribe. He merely surrendered to extortion. The opinion points out that he demanded proof of the rezoning as a condition of the delivery of the money. But in the circumstances, that is no more evidence of willing participation than would be a failure to deliver ransom without a prior assurance of the safety of the kidnap victim.

Respondent has not been guilty of bribery. Moreover, he was charged with extortion, not bribery. The fundamental Sixth Amendment right to know the nature and cause of the accusation, applicable in disbarment proceedings, (*In re Ruffalo,* 1967, 390 U. S. 544, 550) should preclude his capital conviction of a crime never charged against him.

Constitutional Objections to the Penalty

Exaction of the ultimate penalty in this case constitutes denial of the Fourteenth Amendment right to equal protection of the laws. With equal force, given the circumstances, it denies both state and federal constitutional protection (Eight and Fourteenth Amendments) against cruel and unusual punishment.

This Court has frequently held that although uniformity of penalty is desirable, each case must be decided upon its own merits (*In re Andros,* 64 Ill. 2d 426 (1976)) in the light of "the particular factual situation presented", *In re Leonard,* 64 Ill. 2d 398, 404 (1976). In its application to the gravest of all possible penalties, constitutional standards require at a minimum that the penalty be proportioned in accordance with the

degree of culpability and bear some logical relationship to that imposed in comparable cases, thus insuring reasonable proportionality to the nature of the offense. Cf. *Furman* v. *Georgia*, 408 U. S. 238 (1972).

The inappropriateness, under the facts of this case, of the imposition of the ultimate penalty is rendered pellucid by comparison with the sanction imposed in *In re Cook* (1977), 67 Ill. 2d 26. (See also, *State ex rel. Nebraska Bar Association* v. *Cook*, 194 Neb. 364, 232 N. W. 120, from which the predicate facts may be determined.) An effective sixteen-month suspension was imposed on Cook. This respondent faces disbarment. Some comparison is in order.

	Cook	Respondent
Age at time of offense:	45	26
Did offense involve misuse of official status?	Yes	No
Did offense involve misconduct in the fact of the court?	Yes	No
Was the lawyer's ultimate testimony rejected by the trial jury as false?	Yes	No
Amount of money mishandled:	$250,000	$20,000
Did the attorney derive meaningful personal gain from his misconduct?	Yes	No

Cook, of course, is a spectacular case involving the gravest of misconduct at the highest levels, threatening the very structure of the republic. But even by the standard of more mundane cases, the penalty exacted here is unreasonable. By comparison, we cite:

(a) *In re Howard* (1978) 64 Ill. 2d 343—a two-year suspension was enforced for bribing a policeman to influence his testimony; for stating that other payments would be made to influence the prosecutor and the judge in the case in which the lawyer was appearing; and for lying before the review board.

(b) *In re Leonard* (1976) 64 Ill. 2d 398—a three-year suspension for aiding and bribery, falsifying records and participation, resulting in criminal conviction, in corruption involving the office of the Secretary of State.

(c) *In re Tuttle* (1939) 371 Ill. 153—a two-year suspension for bribery of the head of the State Tax Commission over a protracted period.

(d) *In re Huff* (1939) 371 Ill. 198—a two-year suspension for protracted course of bribery of the Chairman of the State Tax Commission.

Cook, therefore, certainly does not stand alone as a predicate for the constitutional objection to the penalty imposed on this respondent. The *Cook* disciplinary proceedings originated in Nebraska. But this Court did simply enforce the Nebraska judgment; an independent proceeding was instituted. And if authority from other states would be deemed persuasive, we would cite such cases as *In re Goldstein* (1970) 320 NYS 2d 299, in which an attorney who had made 64 bribery payments to Internal Revenue agents over an extended period was punished by a three-year suspension. *In re Fenton* (1970) 313 NYS 2d 636, adjudged a six-month suspension against two attorneys who had bribed an Internal Revenue agent, thereby establishing that the penalty in *Goldstein* was not an atypical exercise of compassion.

We do not challenge this Court's authority to establish its own standards for discipline within this State. But we think that *Cook* must be placed in proper perspective, and we urge that a punishment standard which will permit the ultimate penalty where strong and relevant mitigation appears, should have no place in a logical system of justice.

The Existing Injury

By its opinion, this Court has set the highest standards for our profession, as it should. The opinion's deterrent effect has already been created. It would be no less desirable that the Court also demonstrate its collective compassion for human suffering.

Respondent Carnow and his family had suffered enormously even before general publication of the Court's opinion on October 6. The recent newspaper notoriety has cast him into disrepute in the community. Simply put, the respondent and his family have suffered, and their dreams and aspirations have been destroyed no less thoroughly than has their source of livelihood. This Court has never before been so harsh under such strong mitigating circumstances.

Conclusion

For the foregoing reasons, we pray that rehearing be granted and that respondent be authorized to continue in the practice of law.

Respectfully submitted,

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